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SENTENCE

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

16 CR 104 (RMB)

5 HOSTO DURAN,

6 Defendant.

7 -----x

8 New York, N.Y.  
9 December 21, 2016  
10:05 a.m.

10 Before:

11 HON. RICHARD M. BERMAN,

12 District Judge

13  
14 APPEARANCES

15 PREET BHARARA,

16 United States Attorney for the  
Southern District of New York

17 ELI MARK

Assistant United States Attorney

18 PATRICK JEROME BRACKLEY

19 Attorney for Defendant

20 ALSO PRESENT:

21 FRANCISCO OLIVERO, Spanish Interpreter

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1 (Case called)

2 THE COURT: As you know, we are on today for  
3 sentencing.

4 THE INTERPRETER: My apologies, your Honor, the  
5 interpreter thought that the equipment was working.

6 (Pause)

7 MR. BRACKLEY: Judge, before that, the interpreter has  
8 an extra set of headphones for one of the defendant's family  
9 members, and I seek your permission --

10 THE COURT: Sure.

11 MR. BRACKLEY: Thank you, Judge.

12 (Pause)

13 THE INTERPRETER: Thank you.

14 THE COURT: Is Mr. Duran able to understand these  
15 proceedings with the help of the interpreter?

16 THE DEFENDANT: Yes.

17 THE COURT: We are here for sentencing today. The  
18 rules of sentencing have changed. The sentencing guidelines  
19 are no longer mandatory and instead what we do, as sentencing  
20 judges, is to look at the factors found at 18, United States  
21 Code, Section 3553(a), which I've done before taking the bench  
22 today. They include the nature and the circumstances of the  
23 offense as well as the history and characteristics of the  
24 defendant. We try to accomplish these objectives reflecting  
25 the seriousness of the offense, promoting respect for the law,

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1 providing just punishment, affording adequate deterrence to  
2 criminal conduct, protecting the public from further crimes,  
3 providing the defendant with any needed educational or  
4 vocational training or medical care or other correctional  
5 treatment in the most effective manner.

6 In doing all that, we look at the kinds of sentences  
7 available, including the kinds of sentence and the sentencing  
8 range established under the sentencing guidelines, even though  
9 these are no longer mandatory; we also review any policy  
10 statements issued by the United States Sentencing Commission  
11 that may be applicable; we seek to avoid unwarranted sentence  
12 disparities among similarly situated defendants; and, in  
13 appropriate cases, to provide for restitution.

14 We start with a guidelines analysis. Here, the  
15 guideline range is 70 months to 87 months of incarceration,  
16 based on an offense level of 27 and a criminal history category  
17 of 1.

18 In reviewing the factors at 18, United States Code,  
19 Section 3553(a), these stand out as most relevant:

20 Mr. Duran pled guilty on September 14, 2016, to a  
21 conspiracy to distribute and possess with the intent to  
22 distribute heroin and cocaine. That was done before Magistrate  
23 Judge Gorenstein. The guilty plea was accepted by me on  
24 September 20.

25 Mr. Duran pled guilty pursuant to a plea agreement

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1 which was dated July 27, 2016, in which there was a stipulated  
2 guideline range of 70 to 87 months, based on an offense level  
3 of 27 and a criminal history category of I.

4 Mr. Duran is 40, he's married and has two children.  
5 He was born in the Dominican Republic but became a United  
6 States naturalized citizen in 2012. He has some college  
7 education. He has been employed in the past working for  
8 Quik Park, where he made copies, it is said, of customer credit  
9 cards for his own personal use while in that employment. He  
10 also has some charges pending in state court.

11 Mr. Duran was initially on pretrial release but was  
12 remanded by the Court after he was arrested on charges of  
13 identity theft. He's been in custody now for approximately two  
14 months.

15 The presentence report says that there was a court  
16 date of 11/22/16 scheduled. He was remanded in federal custody  
17 at that time, so it's unclear what took place in state court.  
18 Perhaps during the course of the proceedings somebody might  
19 know the answer to that.

20 Mr. Duran has also been an Uber driver, and this  
21 offense that we're here about occurred during his employment as  
22 an Uber driver.

23 Prior to that employment, he worked for various car  
24 services and limousine companies. He also has prior employment  
25 at a gym, a furniture store, and a clothing company.

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1 By letter dated November 29, 2016, defense counsel  
2 requests a no more than a bottom-of-the-guideline sentence.  
3 Among other things, defense counsel notes the strong family  
4 ties the defendant has as well as his strong work history. And  
5 that is remarkably demonstrated in the materials submitted  
6 particularly by family and friends of Mr. Duran in the form of  
7 letters to the Court.

8 Defense counsel states that despite his minimal  
9 education and few marketable skills, Mr. Duran has exhibited  
10 considerable industry since his arrival here in 2000 in search  
11 of a better life. Defense counsel states that despite his  
12 recent misstep under pretrial supervision, Mr. Duran's  
13 consistent industry, strong family ties, acceptance of  
14 responsibility, and absence of substance abuse history indicate  
15 great potential for rehabilitation. They likewise suggest --  
16 this is a quote from defense counsel -- they likewise suggest  
17 that a low sentence would neither deprecate the seriousness of  
18 the offense nor undermine respect for the law and would  
19 therefore be just.

20 Defense counsel, as I mentioned, submitted letters  
21 from the defendant, from his wife, his former wife, his  
22 children, sisters, nephews, nieces, other relatives. Each of  
23 these letters described the defendant as a good, hardworking  
24 man, who takes care of his family and is a man who was greatly  
25 affected by the passing of his father.

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1 By letter dated December 7, the government notes that  
2 defendant's conduct in this case was serious as he "principally  
3 acted as the driver for the coconspirators to pick up narcotics  
4 from individuals working with a Mexican cartel, deliver the  
5 drugs to potential customers and pick up narcotics proceeds  
6 from customers."

7 The government requests a sentence within the  
8 stipulated guideline range but also asks the Court to consider  
9 the following -- that is to say, the government acknowledges  
10 that the defendant qualifies for safety-valve treatment and  
11 advises the Court that following his arrest, the defendant  
12 promptly informed the government of his willingness to  
13 cooperate. The government advises the Court that the defendant  
14 proffered information about other narcotics traffickers in the  
15 United States and that he attempted, although unsuccessfully,  
16 to obtain a portion of narcotics proceeds that was on the  
17 street.

18 Although the government determined that a cooperation  
19 agreement was not warranted, the government believes that the  
20 defendant provided truthful information about individuals he  
21 believed to be trafficking in narcotics. Additionally, the  
22 government notes that the defendant has identified certain  
23 aspects of his personal background and circumstances that also  
24 warrant consideration at sentencing.

25 So I've also reviewed the presentence investigation

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1 report dated December 6, 2016, counsel's letter of November 29,  
2 and the government's December 7th letter.

3 Counsel, have you and Mr. Duran had the opportunity to  
4 read and discuss the presentence investigation report along  
5 with the addendum and sentencing recommendation?

6 MR. BRACKLEY: Yes, your Honor.

7 THE COURT: Mr. Duran, have you been over that  
8 presentence report with your counsel?

9 THE DEFENDANT: Yes.

10 THE COURT: Do either of you have any objections to  
11 the content of that report?

12 MR. BRACKLEY: None, Judge.

13 THE COURT: Mr. Duran, any objections from you to the  
14 content of the presentence report?

15 THE DEFENDANT: No.

16 THE COURT: So I'll return that report to the  
17 probation department.

18 I'm happy to hear from defense counsel at this time,  
19 from Mr. Duran, and from the government.

20 MR. BRACKLEY: Thank you, Judge.

21 Good morning, your Honor.

22 THE COURT: Good morning.

23 MR. BRACKLEY: As I listened to your recitation of the  
24 nature and history of the case, Judge, I'm humbled by the fact  
25 you hit every single major point, especially the fact that

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1 Mr. Duran came to this country from a very large family, was  
2 law-abiding the entire time, married, was in the process of  
3 raising his children, and then in a very short period of time,  
4 in essence, threw it all away by getting arrested in what you  
5 probably see every day are countless drug conspiracies and  
6 everybody's minor or major participation in what in the  
7 beginning looks like an easy way to make money and in the end  
8 ends up putting a man in jail who has never been incarcerated a  
9 day in his life, who is now looking at multiple years in jail  
10 under the guidelines at least.

11 And, of course, Judge, we are here sheepish with this  
12 new arrest situation because, generally, we like to stand at  
13 sentences and talk about the law-abiding life and all of the  
14 wonderful things that somebody's going to do but, as you well  
15 know, in the process of this case, he was arrested on a  
16 misdemeanor. And I will report to the Court for your  
17 consideration that he was working at a garage. There were some  
18 individuals there who were creating credit cards, and he was  
19 arrested trying to go to a restaurant and spend \$12 on one of  
20 those cards or some minor amount of money, not that that  
21 excuses it but he promptly began to discuss it with the  
22 detectives and he has proffered in the state court. And that  
23 case will, I believe, Judge, be resolved with a disorderly  
24 conduct, upon him identifying whoever it was that was there  
25 doing that.



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1 THE COURT: Do you represent him there too?

2 MR. BRACKLEY: I do, your Honor.

3 As you can see, his family is in court. Those members  
4 who you have discussed who have written letters -- his wife,  
5 his prior wife, his cousins, his children, his family -- and  
6 they have been with him since the very beginning. That has  
7 always, for me, Judge, even as his lawyer -- as you point out,  
8 I stuck with him in the state court -- has been the most  
9 troubling aspect of this, is that basically it halted every  
10 aspect of their lives. And then I ended up down in a precinct  
11 with his credit card case, and I really don't know what to tell  
12 you about that except I think at the time he was working, it  
13 became part and parcel of what it was to work there but he  
14 immediately fessed up to it.

15 So what I would ask, Judge, is that, based upon all of  
16 that and what I believe is his minimal role in the underlying  
17 offense, the sentence I would recommend, Judge, is 36 months.  
18 I believe that that would be a period of incarceration. Some  
19 lawyers would ask for probation but I think, Judge, it's a  
20 significant conspiracy and I think, in fairness, in light of  
21 the guidelines, that is a reasonable sentence.

22 THE COURT: Mr. Duran, do you want to make any  
23 comment?

24 THE DEFENDANT: Yes.

25 May I stand up?

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1 THE COURT: You can if you wish or you can remain  
2 seated, as long as you talk into the microphone.

3 THE DEFENDANT: May I start?

4 THE COURT: Yes.

5 THE DEFENDANT: I would like to thank your Honor and I  
6 would like to apologize to the City of New York, which is my  
7 city and I love. I'm sorry for the bad acts I committed. I  
8 apologize to my family and my children, to this country and to  
9 anyone affected by this case, to my children that I love.

10 Thank you, sir.

11 THE COURT: Counsel for the government?

12 MR. MARK: Your Honor, we rest on our December 7th  
13 submission to the Court.

14 THE COURT: Okay. So I am going to adopt the findings  
15 of fact in the presentence investigation report unless defense  
16 counsel has any further objection or any objection to that.

17 MR. BRACKLEY: No, Judge.

18 THE COURT: Or any objection from Mr. Duran?

19 THE DEFENDANT: No.

20 THE COURT: Or from the government?

21 MR. MARK: No, your Honor.

22 THE COURT: Okay.

23 Let's move to what the proper sentence, a fair  
24 sentence, should be. The most remarkable aspect of this case  
25 is that -- and counsel is right, I have had hundreds, I guess,

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1 of conspiracies, of drug conspiracies -- the huge difference is  
2 that most, almost all, of the defendants do not have strong  
3 family support and ties, and so their behavior is actually a  
4 little more understandable, actually, because they come from  
5 usually chaotic backgrounds and family situations. This one is  
6 so stable and supportive and it's quite remarkable.

7 The second significant difference is that, in all of  
8 those other cases, or most of them, the defendants don't work,  
9 and so their life is centered around drug activity or unlawful  
10 behavior. And here, Mr. Duran always has had productive  
11 employment. So you have to say to yourself, why does it happen  
12 in this case? That's the part that is elusive to me. But  
13 anyway, I think everybody gets what I'm saying. I don't know  
14 if there is really an explanation but that's the curious aspect  
15 of the case to me.

16 Here's what I plan to do, and then I will impose the  
17 sentence: I am going to go outside the sentencing guidelines,  
18 below it. I don't think it's appropriate to go as far as  
19 defense counsel has asked, but I do think I can be comfortable  
20 with a sentence of 52 months of incarceration instead of 70  
21 months. The offense level is 27; the criminal history category  
22 is I. That would be followed by three years of supervised  
23 release -- hold on one second.

24 (Pause)

25 THE COURT: So I intend to impose a sentence of three

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1 years of supervision following release from incarceration.

2 That supervision would be subject to the mandatory conditions:

3 That defendant not commit another federal, state or local

4 crime; that he not illegally possess a controlled substance;

5 that he not possess a firearm, dangerous weapon or destructive

6 device; and that he refrain from any unlawful use of a

7 controlled substance; he would be required to submit to one

8 drug test within 15 days of placement on supervised release and

9 at least two unscheduled drug tests thereafter, as may be

10 directed by the probation officer.

11 In addition, he is required to comply with what are  
12 called the standard conditions, plus these:

13 That he will be supervised in his district of  
14 residence when supervised release comes into play;

15 He will be required to report to the probation  
16 department within 48 hours of release from custody. And here  
17 I'm going to add that, if this is deemed necessary or  
18 appropriate or helpful by the probation department, I'm going  
19 to also suggest that they have him, Mr. Duran, participate in  
20 weekly therapeutic counseling by a licensed therapist. He may  
21 be required to contribute to the cost of services rendered, as  
22 by a co-payment, in an amount to be determined by the probation  
23 officer based on ability to pay or availability of third-party  
24 payment. So this is within the discretion of the probation  
25 department.

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1 I am not imposing a fine. None is recommended in the  
2 presentence materials.

3 I am not imposing restitution. There is no victim  
4 within the meaning of 18, United States Code, Section 3663 or  
5 3663(a).

6 I am imposing a \$100 special assessment, which is  
7 mandatory under 18, United States Code, Section 3013.

8 The reasons for this sentence are, notwithstanding  
9 that the offense level is 27 and the criminal history category  
10 is I and that the sentencing guideline range, albeit not  
11 mandatory, is 70 to 87 months of incarceration, I believe that  
12 going lower than the low end of the guideline range, to 52  
13 months of incarceration, which constitutes a significant break,  
14 so to speak, for the defendant, I think it's appropriate,  
15 having considered his history and characteristics, the nature  
16 and circumstances of the crime, particularly his strong family  
17 ties and relations, and his employment history. I also think  
18 this sentence reflects the seriousness of the offense, promotes  
19 respect for the law, provides just punishment, affords adequate  
20 deterrence to criminal conduct, and protects the public from  
21 further crimes. It also suggests and provides needed  
22 correctional treatment or medical care, in this case the  
23 suggestion of mental health counseling, in the most effective  
24 manner.

25 So that's what I propose to do and I will do it unless

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1 defense counsel has anything further to add at this time.

2 MR. BRACKLEY: No, Judge. Thank you.

3 THE COURT: Anything further from Mr. Duran?

4 THE DEFENDANT: No.

5 THE COURT: How about from the government?

6 MR. MARK: No, your Honor.

7 THE COURT: Then I would ask Mr. Duran to please stand  
8 and I will impose the sentence.

9 The guideline range is 70 to 87 months of  
10 incarceration, but having considered the factors at 18, United  
11 States Code, Section 3553(a), it is my judgment that the  
12 defendant, Hosto Duran, be committed to the custody of the  
13 Bureau of Prisons to be imprisoned for a term of 52 months,  
14 followed by three years of supervised release subject to the  
15 terms and conditions that I mentioned and incorporate here by  
16 reference; no fine; no restitution; \$100 special assessment,  
17 which is due immediately.

18 The reasons for this sentence and the significant  
19 departure downward from the guidelines is that I believe this  
20 sentence is compatible with 18, United States Code, Section  
21 3553(a).

22 Does either counsel know of any legal reason why the  
23 sentence should not be imposed as so stated?

24 MR. MARK: No, your Honor.

25 MR. BRACKLEY: No, Judge Berman.

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1 THE COURT: Then I hereby order the sentence to be  
2 imposed as so stated.

3 Mr. Duran, to the extent that you have not already  
4 waived your appeal rights -- and now I'm talking about the plea  
5 agreement dated July 27, 2016, which in fact contains several  
6 waivers of the right to appeal. The agreement was signed on  
7 September 14, 2016, and in it you agree that you would not file  
8 a direct appeal. You also agreed that you would not bring a  
9 collateral challenge, including, but not limited to, an  
10 application under 28, United States Code, Sections 2255 and/or  
11 2241, and you also agreed not to seek a sentence modification  
12 under 18, United States Code, Section 3582(c) of any sentence  
13 that is within or below the guideline range of 70 to 87 months,  
14 and, of course, this sentence is below that, so these waivers  
15 of your various rights to appeal do apply.

16 You also in that plea agreement waived the right to  
17 appeal any term of supervised release that is less than or  
18 equal to the statutory maximum, which is lifetime, and I have  
19 imposed three years, so that clearly triggers that waiver of  
20 that appeal right as well.

21 From the government, any open aspects of the case  
22 which you would like to resolve at this time?

23 MR. MARK: There is an underlying information, so at  
24 this time the government moves to dismiss any open counts, your  
25 Honor.

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1 THE COURT: Okay. I will grant that application.

2 And then, starting with the government, did you wish  
3 to add anything to today's sentencing proceeding?

4 MR. MARK: No, your Honor.

5 THE COURT: How about defense counsel?

6 MR. BRACKLEY: No, Judge. Have a fine holiday, sir.

7 THE COURT: You too, you too. I think that concludes  
8 our work for today.

9 Mr. Duran, I wish you the very best of luck going  
10 forward. Thanks very much.

11 MR. BRACKLEY: Thank you.

12 MR. MARK: Thank you, your Honor.

13 THE COURT: Counsel, did you have any thought about  
14 the location of confinement?

15 MR. BRACKLEY: Yes, Judge. I did request in my  
16 memorandum, to the extent that this Court is able to do that,  
17 to recommend somewhere in the Northeast.

18 THE COURT: Close to New York City?

19 MR. BRACKLEY: Yes, Judge.

20 THE COURT: So I'll make that recommendation.

21 MR. BRACKLEY: Thank you, Judge.

22 \* \* \*